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## Reasons for Decision

**TransGas Limited**

**Application for Review of  
Decision re: WBI Canadian  
Pipeline, Ltd.**

**GH-R-1-93**

**October 1993**

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**Review**

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# National Energy Board

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## Reasons for Decision

In the Matter of

## TransGas Limited

Application dated 23 April 1993 for a review and variance of a decision of the Board dated 25 February 1993 dismissing an application dated 9 October 1992 by WBI Canadian Pipeline, Ltd.

**GH-R-1-93**

**October 1993**





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## Table of Contents

Abbreviations .....	iii
Recital and Submitters .....	iv
1. Background .....	1
1.1 WBI Canadian Facilities Application .....	1
1.2 Dismissal of WBI Canadian Application .....	1
1.3 TransGas Application for Review .....	2
2. Summary of Evidence - Capacity and Functions of Steelman/North Portal Extension .....	5
2.1 Capacity of Extension .....	5
2.2 Functions of Extension .....	5
2.2.1 Delivery of Gas to WBI Canadian for Export .....	5
2.2.2 Servicing of Existing Intraprovincial Markets .....	6
2.2.3 Security of Supply for Existing Gas Customers in Southeast Saskatchewan .....	6
2.2.4 Security of Supply to Southeast Saskatchewan via Line Reversal .....	6
2.2.5 Creation of Infrastructure to Attract Industry and Develop New Intraprovincial markets for Natural Gas .....	6
2.2.6 Access to and Development of Storage Caverns .....	7
2.2.7 Potential Production of Gas Reserves Along the Route of the Line .....	7
2.2.8 Potential Expansion of Shand Electrical Generating Plant .....	8
2.2.9 Potential Tie-Ins to Other Communities in the Area .....	8
3. Submissions .....	10
3.1 WBI Canadian Pipeline, Ltd. ....	10
3.2 Ocelot Energy Inc. ....	10
3.3 Interenergy Corporation .....	11
3.4 TransGas Limited .....	11
4. Views and Decisions of the Board .....	13
4.1 The WBI Canadian Application .....	13
4.2 The Board's Jurisdiction over the Steelman/North Portal Extension .....	13
5. Disposition .....	18
6. Dissent .....	19
6.1 Dissenting Opinions of J.-G. Fredette and C. Bélanger on the Board's Jurisdiction over the Steelman/North Portal Extension .....	19

## Figures

1. Location Map - Proposed WBI Canadian Pipeline and Existing Pipeline Grid in Southeast Saskatchewan ..... 3
2. Expanded View of Facilities at International Border ..... 4

## Appendix

- I Order XG-W57-3-93 ..... 20



## Abbreviations

Act	<i>National Energy Board Act</i>
Bcf	billion cubic feet
Board	National Energy Board
EARP Guidelines Order	<i>Environmental Assessment and Review Process Guidelines Order</i>
Extension or new TransGas line	Steelman/North Portal Extension
Interenergy	Interenergy Corporation
km	kilometre
m	metre
m <sup>3</sup>	cubic metre
mm	millimetre
MMcf	million cubic feet
Ocelot	Ocelot Energy Inc.
SaskEnergy	SaskEnergy Incorporated
SaskPower	Saskatchewan Power Corporation
Shand plant	Shand electrical generating plant
TransGas	TransGas Limited
WBI Canadian	WBI Canadian Pipeline, Ltd.
Williston Basin	Williston Basin Interstate Pipeline Company

## Recital and Submitters

IN THE MATTER of the *National Energy Board Act*, being Chapter N-7 of the Revised Statutes of Canada, 1985, as amended, and the Regulations made thereunder;

AND IN THE MATTER OF a National Energy Board decision dated 25 February 1993 and relating to an application dated 9 October 1992 by WBI Canadian Pipeline, Ltd. for an order pursuant to Section 58 of the *National Energy Board Act* in respect of the construction and operation of a proposed natural gas pipeline;

AND IN THE MATTER OF an Application by TransGas Limited, pursuant to Section 21 of the *National Energy Board Act* for a review and variance of the decision of the National Energy Board dated 25 February 1993; and

IN THE MATTER OF the National Energy Board Directions on Procedure, Order GH-R-1-93.

EXAMINED by means of written submissions.

### BEFORE

R. Priddle	Presiding Member
J.-G. Fredette	Member
A.B. Gilmour <sup>1</sup>	Member
A. Côté-Verhaaf	Member
C. Bélanger	Member
R. Illing	Member
R.L. Andrew, Q.C.	Member

### SUBMITTORS

TransGas Limited  
WBI Canadian Pipeline, Ltd.  
Ocelot Energy Inc.  
Interenergy Corporation

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<sup>1</sup>Mr. A.B. Gilmour participated in the GH-R-1-93 Review Proceeding; however, he retired before the Reasons for Decision were issued.



# Background

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## 1.1 WBI Canadian Facilities Application

On 9 October 1992, WBI Canadian Pipeline, Ltd. ("WBI Canadian"), a wholly owned subsidiary of Williston Basin Interstate Pipeline Company ("Williston Basin"), applied to the National Energy Board ("the Board") pursuant to section 58 of the *National Energy Board Act* ("the Act") for an order authorizing the construction of an international gas transmission pipeline commencing near North Portal, Saskatchewan, and terminating at the international boundary with the United States of America ("the WBI Canadian line").

The applied-for facilities consist of approximately 1,150 m of 219.1 mm (8 inch nominal) diameter line pipe having an initial firm capacity of about  $281 \times 10^3 \text{ m}^3$  (10 MMcf) per day. WBI Canadian had indicated that its facilities would be constructed by TransGas Limited ("TransGas") at an estimated cost of nearly \$147,000, and would be operated and maintained by TransGas in accordance with a management service agreement with WBI Canadian.

As shown on Figures 1 and 2, the WBI Canadian line, once constructed, would connect upstream with the natural gas transmission system of TransGas at a point near North Portal. The specific connection would be with a newly-constructed portion of the TransGas system consisting of 35.6 km of 219.1 mm (8 inch nominal) diameter pipeline between Steelman and North Portal, Saskatchewan ("the Steelman/North Portal Extension", "the Extension", or "the new TransGas line"), which connects with existing TransGas facilities. The Steelman/North Portal Extension was constructed in November 1992 and was placed into service on 4 February 1993. The WBI Canadian line, once constructed, would connect downstream at the international border between Saskatchewan and North Dakota with the newly-constructed facilities of Williston Basin.

## 1.2 Dismissal of WBI Canadian Application

On 25 February 1993, the Board dismissed the WBI Canadian application on the ground that the newly-constructed Steelman/North Portal Extension was integral and essential to the proposed facilities of WBI Canadian and that once connected and operations commenced, the WBI Canadian line and the Steelman/North Portal Extension would be operated as one overall undertaking of an international character. The Board found that the primary purpose of both the Steelman/North Portal Extension and the WBI Canadian line was to deliver gas produced in Canada to the United States of America and that although ownership of the two pipelines was separate, it was apparent that the lines were intended to be constructed and operated as one system. The Board, therefore, determined that the combined WBI Canadian line and the Steelman/North Portal Extension will constitute one federal work and undertaking which should properly fall within federal jurisdiction under paragraph 92(10)(a) of the *Constitution Act, 1867* and, accordingly, should be regulated by the National Energy Board. As the application which was before the Board did not include the upstream facilities consisting of the Steelman/North Portal Extension, the Board dismissed the WBI Canadian application.



### 1.3 TransGas Application for Review

By application dated 23 April 1993, TransGas applied pursuant to the provisions of section 21 of the Act for a review of the Board's decision dated 25 February 1993. The application for review alleged, *inter alia*, that the Board erred in law or jurisdiction when it:

- (a) made a decision having a direct and adverse impact on TransGas, which was not a party to the proceeding, without providing TransGas with any notice of the issues being considered or any opportunity to be heard in respect of those issues;
- (b) rejected the WBI Canadian application "on jurisdictional grounds" without providing notice to WBI Canadian or anyone else that the Board considered that a jurisdiction issue had been raised, and without providing any opportunity for interested parties to be heard on the jurisdictional issue; and
- (c) determined on the basis of the restricted facts included in the WBI Canadian application that certain pipeline facilities already constructed, owned and operated by TransGas, as well as the pipeline facilities proposed by WBI Canadian, were properly within the exclusive jurisdiction of the Board.

TransGas further alleged that:

- (a) facts relevant to the issue of jurisdiction exist but were not placed in evidence in the original proceeding;
- (b) such facts were not discoverable as relevant by TransGas or any other party by reasonable diligence since the Board did not identify or inform WBI Canadian or TransGas that the Board considered any jurisdictional issue to have been raised by the WBI Canadian application; and
- (c) the existence of such facts raised a doubt as to the correctness of the WBI Canadian decision.

On 20 May 1993, the Board decided to undertake a review of its decision based on the grounds set out in the TransGas application for review. The review was conducted in accordance with the Directions on Procedure contained in National Energy Board Order GH-R-1-93 dated 4 June 1993.

Figure 1  
Location Map – Proposed WBI Canadian Pipeline  
and Existing Pipeline Grid in Southeast Saskatchewan

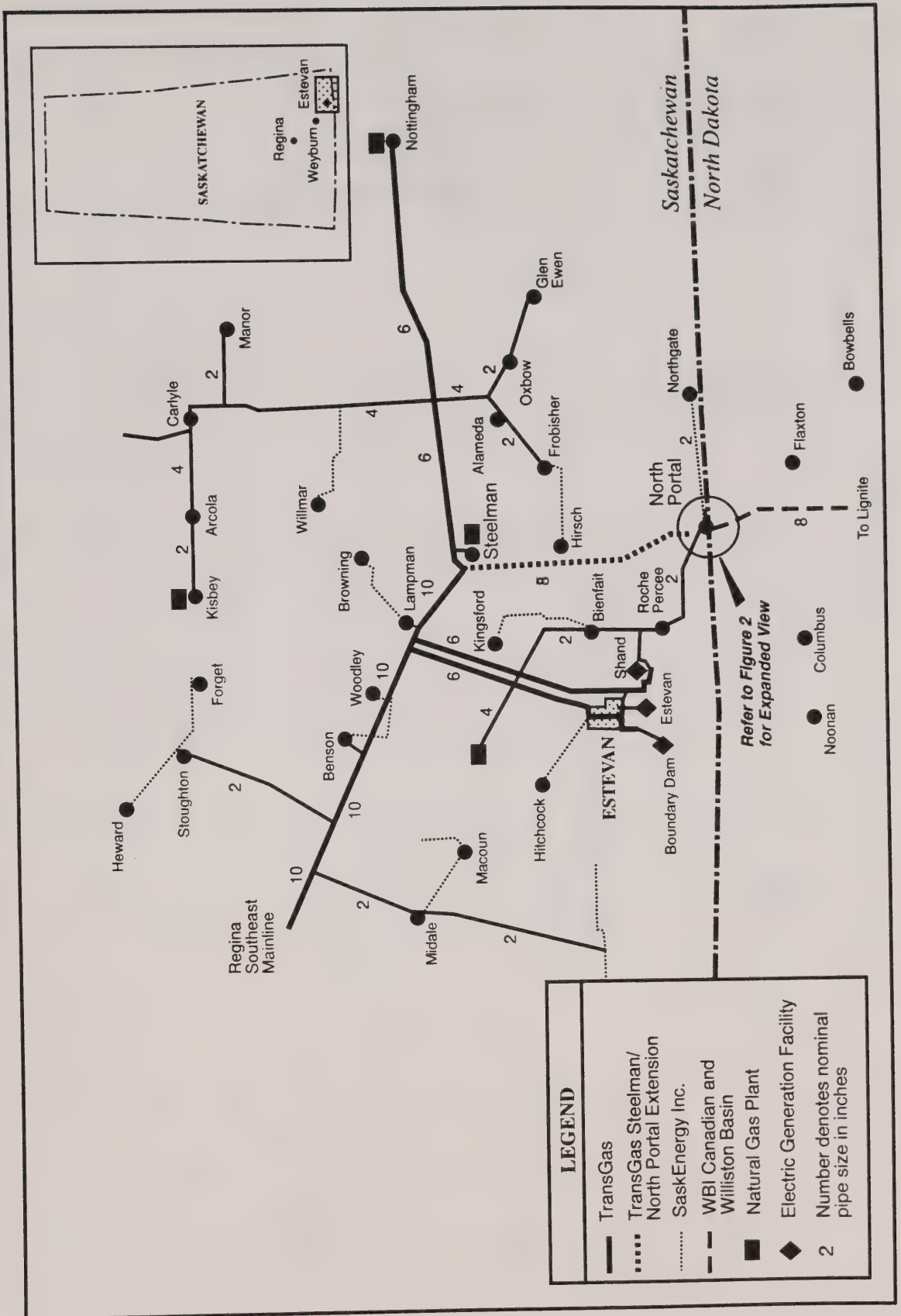
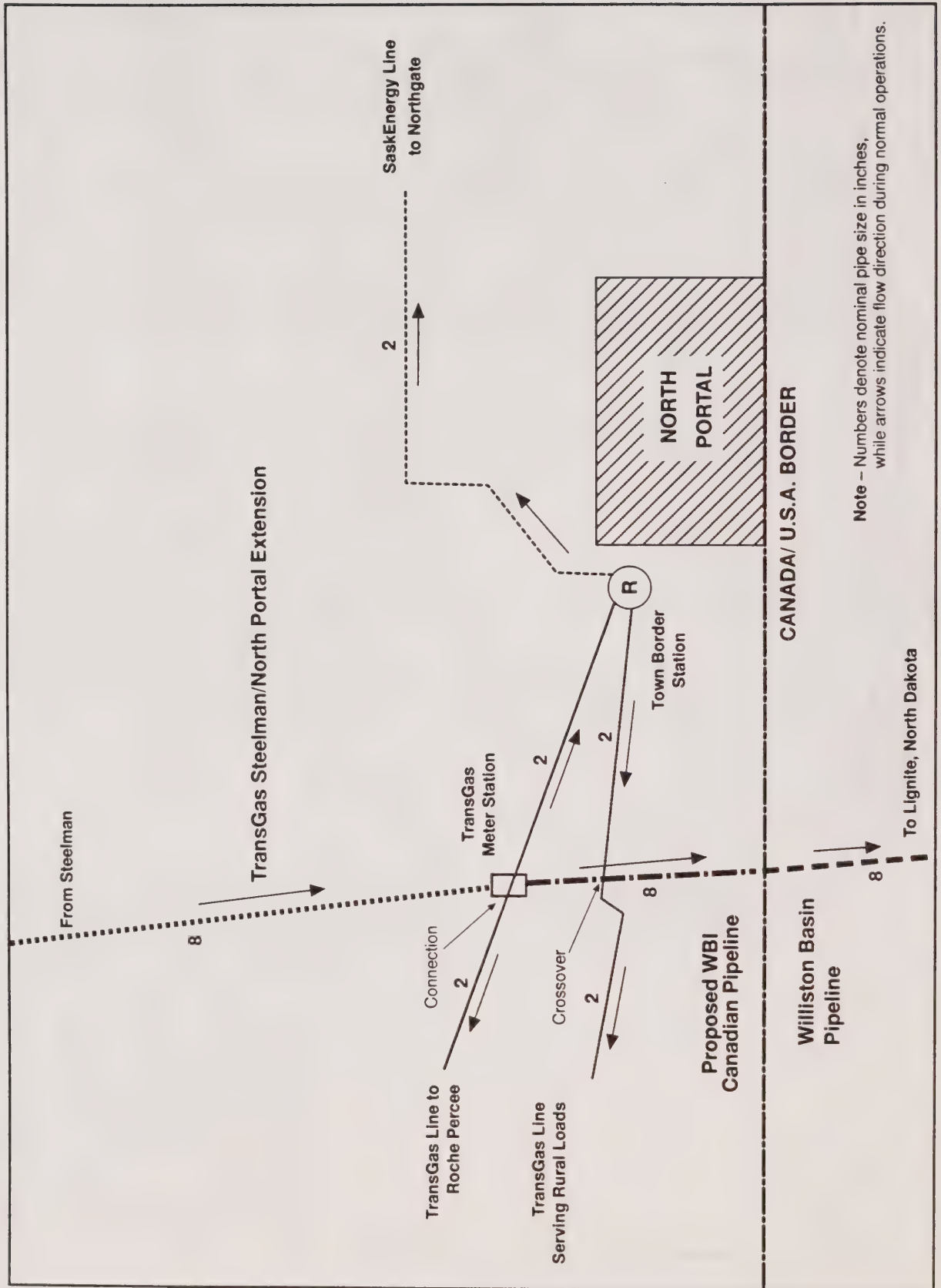




Figure 2  
Expanded View of Facilities at International Border



## Summary of Evidence - Capacity and Functions of Steelman/North Portal Extension

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### 2.1 Capacity of Extension

In its section 58 application, WBI Canadian indicated that the initial firm capacity of both its pipeline and the TransGas Steelman/North Portal Extension would be  $281 \text{ } 10^3\text{m}^3$  (10 MMcf) per day, matching the capacity sought by Ocelot Energy Inc. WBI Canadian further indicated that additional firm capacity could be made available if compression were added.

In its application for review, TransGas stated that the maximum capacity of the Extension could be increased to  $1124 \text{ } 10^3\text{m}^3$  (40 MMcf) per day through the construction of additional facilities on the TransGas system upstream of the Extension, and that the greater capacity could be utilized to serve markets within Saskatchewan as well as in the United States. In its 9 July 1993 submission, TransGas itemized these upstream facility additions and indicated that they were planned to be constructed in the 1994-95 time frame. TransGas also clarified during the GH-R-1-93 proceeding that, with its current system configuration and with the proposed WBI Canadian interconnection in place, the capacity of the Extension would be  $310 \text{ } 10^3\text{m}^3$  (11 MMcf) per day under peak flow conditions for design daily operation and  $318 \text{ } 10^3\text{m}^3$  (11.3 MMcf) per day under peak flow conditions for emergency backstopping operation.

The functions that are being served by these initial incremental volumes, i.e. the  $29 \text{ } 10^3\text{m}^3$  (1 MMcf) per day flowing under design daily operation and the  $37 \text{ } 10^3\text{m}^3$  (1.3 MMcf) per day that could flow under emergency backstopping operation, are described in the section immediately following. That section also summarizes the evidence adduced in respect of the functions that could be served by the  $843 \text{ } 10^3\text{m}^3$  (30 MMcf) per day of extra capacity that could be realized on the Extension through upstream facility additions.

### 2.2 Functions of Extension

#### 2.2.1 Delivery of Gas to WBI Canadian for Export

As indicated above, the proposed WBI Canadian pipeline would initially carry  $281 \text{ } 10^3\text{m}^3$  (10 MMcf) per day of Ocelot-owned gas to the international border for export. In its 9 July 1993 submission, TransGas stated that Ocelot has indicated a commitment to contract for the corresponding capacity on the Steelman/North Portal Extension, but that the contract has not yet been executed. When asked by the Board to comment on the likelihood of future added capacity on the Extension being used to deliver export volumes to WBI Canadian beyond the  $281 \text{ } 10^3\text{m}^3$  (10 MMcf) per day requested by Ocelot, TransGas acknowledged that, based on inquiries received, "there may be other natural gas producers which will seek

intraprovincial transportation on the TransGas system for delivery into the WBI Canadian pipeline in the future".

### **2.2.2 Servicing of Existing Intraprovincial Markets**

TransGas clarified that the Steelman/North Portal Extension has been in service since 4 February 1993, with gas being delivered to markets in southeastern Saskatchewan via a pre-existing 60.3 mm (2 inch nominal) diameter TransGas pipeline with which the Extension interconnects at the North Portal Meter Station site (reference Figure 2). TransGas confirmed that the volumes of gas flowing on the Extension are presently not metered as they are delivered on or off the Extension. However, based upon modelling and analysis of its total system gas flows, TransGas estimates that approximately  $28 \times 10^3 \text{ m}^3$  (1 MMcf) per day of gas is flowing through the Extension during periods of peak system operation. A flow diagram provided by TransGas indicates that this gas is being delivered to the communities of North Portal, Northgate, Roche Percee, and Bienfait and to the Shand electrical generating facility.

### **2.2.3 Security of Supply for Existing Gas Customers in Southeast Saskatchewan**

TransGas stated that the Steelman/North Portal Extension provides "security of supply and backstopping to the City of Estevan, the Estevan Boundary Dam and Shand electrical generating stations of Saskatchewan Power Corporation, and the towns of North Portal, Northgate, Roche Percee, Bienfait and Kingsford and farms in the surrounding rural areas". In response to a Board information request, TransGas provided a map illustrating a typical backstopping scenario. Under that particular scenario, which involves an outage condition for one of the 168.3 mm (6 inch nominal) diameter pipelines on the Estevan lateral, approximately  $36.8 \times 10^3 \text{ m}^3$  (1.3 MMcf) per day of gas would be delivered off the Steelman/North Portal Extension for domestic use.

### **2.2.4 Security of Supply to Southeast Saskatchewan via Line Reversal**

TransGas indicated that "due to the potential to reverse the flow of both the Steelman/North Portal Extension and the proposed WBI Canadian pipeline, natural gas volumes could be sourced from the Williston Basin system to provide emergency supply to the whole of the TransGas system in southeastern Saskatchewan". In response to a Board information request, TransGas clarified that  $324 \times 10^3 \text{ m}^3$  (11.5 MMcf) per day of natural gas could be reversed through the Steelman/North Portal Extension via the Williston Basin system and the WBI Canadian pipeline.

### **2.2.5 Creation of Infrastructure to Attract Industry and Develop New Intraprovincial Markets for Natural Gas**

TransGas stated that its system "has historically been expanded in a manner and with the intention to create infrastructure to attract industry and develop new intraprovincial markets for natural gas". In response to the Board's request that TransGas elaborate on its perception of the causal connection between the existence of a pipeline and the establishment of industry, TransGas admitted that "the existence of pipeline facilities is only one of the many factors which impact on an industrial gas user's decision to locate its facilities". TransGas added that "the priority that might be placed upon the existence of pipeline facilities vis-à-vis other



commercial or market factors depends upon the industry in which the gas user is participating". TransGas further expressed the view that "historical patterns of industrial development demonstrate that the availability of natural gas pipeline facilities in geographically remote areas of the province has facilitated industrial development, for example in the forestry and pulp industries, which would otherwise have been less economically viable".

## **2.2.6 Access to and Development of Storage Caverns**

TransGas indicated that the potential for a future storage cavern in southeast Saskatchewan was one of the reasons that justified TransGas's decision to build the Extension. TransGas indicated that the geology in the area (i.e. the presence of the 400-foot Prairie Evaporate Salt Thickness) is conducive to the development of storage caverns and, moreover, provided a map showing a potential storage cavern site adjacent to the Extension.

TransGas noted that, in general, security of supply, backstopping, and system operating flexibility can be significantly enhanced through the utilization of storage caverns.

In response to a Board information request, TransGas advised that the potential storage cavern development in the vicinity of the Extension has satisfied its initial screening criteria. TransGas further advised that the second phase of engineering evaluation has begun and that the estimated parameters for the cavern site are (i) injection capability of 0.42 to 0.70  $10^6 \text{ m}^3$  (15-25 MMcf) per day, (ii) withdrawal capability of 0.85 to 1.4  $10^6 \text{ m}^3$  (30-50 MMcf) per day, and (iii) a spacial volume of 56.35 to 84.52  $10^6 \text{ m}^3$  (2-3 Bcf).

TransGas further indicated that "the total development time is approximately 2 to 3 years with the commencement of development dependent upon the results of a final facility option analysis and ranking of targeted cavern development throughout the province". However, when asked by the Board for a copy of any study conducted to determine the need for and feasibility of installing additional storage caverns, TransGas advised that "the product of such analysis does not presently exist in a format that would enable it to be readily compiled and produced to the Board".

In place of such a study, TransGas provided evidence indicating that it has no spare storage capacity for the upcoming 1993/94 season and that there is a queue for additional capacity.

## **2.2.7 Potential Production of Gas Reserves Along the Route of the Line**

In its section 58 application, WBI Canadian indicated that the Steelman/North Portal Extension would "provide pipeline access to natural gas reserves located near the Saskatchewan - North Dakota border". TransGas followed up on this point by indicating that "southeast Saskatchewan is a prime oil and gas producing area with significant potential for future development", and by stating that "encouragement of natural gas development and the potential addition of receipt points to the TransGas System was also a motivating factor in the TransGas decision to build the Steelman/North Portal Extension". Furthermore, TransGas provided a southeast Saskatchewan facility expansion plan map showing a proposed gas plant adjacent to the Extension.

As indicated on Figure 1, there are four existing gas plants in the vicinity of the Steelman/North Portal Extension. TransGas indicated that the peak day and average day

production of those four gas plants in aggregate are 524 10<sup>3</sup>m<sup>3</sup> (18.6 MMcf) and 451 10<sup>3</sup>m<sup>3</sup> (16 MMcf) respectively. TransGas further clarified that the existing provincial loads on these four plants are (i) summer 366 10<sup>3</sup>m<sup>3</sup> (13 MMcf) per day (ii) winter 1352 10<sup>3</sup>m<sup>3</sup> (48 MMcf) per day and (iii) spring/fall 732 10<sup>3</sup>m<sup>3</sup> (26 MMcf) per day. This results in gas from these plants being available to the Steelman/North Portal Extension during the summer only and in the range of 85 10<sup>3</sup>m<sup>3</sup> (3 MMcf) per day.

The Board requested that TransGas provide details of the forecast in-service date and the peak day and average day production capacity for the future natural gas plant proposed to be connected to the Extension. In its response, TransGas indicated that two of the four existing plants in that area of the province have come on-stream within the last two years (1992-93), and that "the in-service dates for all future gas plants will depend upon the development plans of the natural gas producers which own the relevant mineral rights in the area". TransGas conjectured that "based on recent development of incremental associated gas production, the construction of additional gas plant facilities in the near term seems likely". TransGas concluded by stating that "the production capacity of future gas plants will also depend upon the development plans of the natural gas producers and is not presently known by TransGas".

## **2.2.8 Potential Expansion of Shand Electrical Generating Plant**

TransGas noted that the Shand plant, which is located near Estevan (see Figure 1), consists of one 300 megawatt unit but was designed as a two unit development. TransGas went on to state that the "potential expansion of the Shand plant stimulated consideration of the Steelman/North Portal Extension and was one of the factors in the decision to build the Steelman/North Portal Extension".

In response to a Board information request, TransGas stated that if a second unit was to be installed at the Shand plant the associated incremental gas delivery requirement off the Extension would be in the order of 281 10<sup>3</sup>m<sup>3</sup> to 423 10<sup>3</sup>m<sup>3</sup> (10-15 MMcf) per day. TransGas further indicated that looping of the existing line from North Portal to the generating station would need to be completed to permit delivery of the entire incremental volume from the Steelman/North Portal Extension and also stated that "the timing and specifics for the addition of generating capacity in the Estevan area (including expansion of the Shand generating station) have not yet been finalized by SaskPower".

## **2.2.9 Potential Tie-Ins to Other Communities in the Area**

In its section 58 application, WBI Canadian had indicated that there could be future tie-ins to the towns of Hirsch, Frobisher, Alameda, Oxbow, and Glen Ewen off the Steelman/North Portal Extension. This same indication was given by TransGas in its 9 July 1993 submission.

As shown on Figure 1, these communities are to the east of the Extension and are already served by existing TransGas and SaskEnergy facilities (existing peak day requirements about 45 10<sup>3</sup>m<sup>3</sup> (1.6 MMcf) per day in aggregate).

In response to a Board information request, TransGas acknowledged that these communities already have natural gas service and that their tie-in to the Extension would be for the purpose of providing additional security of supply and backstopping. TransGas further clarified that approximately 3 km of 60.3 mm (2 inch nominal) diameter polyethylene pipeline would have

to be installed between the Extension and the existing pipeline at the Town of Hirsch to effect the tie-ins.

With respect to timing, TransGas stated that it has "yet to definitively forecast in-service dates for these tie-ins which will depend upon the pace and location of future demand growth in the area".



## Submissions

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The following participated in the review and made written submissions to the Board:

- WBI Canadian Pipeline, Ltd.;
- Ocelot Energy Inc.;
- Interenergy Corporation; and
- TransGas Limited.

### 3.1 Submission of WBI Canadian Pipeline, Ltd.

In its submission, WBI Canadian maintained that "the materials filed by WBI Canadian provide a complete justification for the approval of the [WBI Canadian] facilities in light of the criteria contained in the Act" and suggested that this fact is not disputed in the Board's 25 February 1993 decision. WBI Canadian also submitted that the Board's decision recognized that there were two separate distinct and independent components of the overall project and that two distinct entities will own the components. Accordingly, WBI Canadian submitted that "it is possible and, in the unique circumstances currently before the Board, preferable for the Board to view the two components of the project separately" and, therefore, to approve the WBI Canadian facilities separate and apart from the Board's consideration of its jurisdiction over the Steelman/North Portal Extension. WBI Canadian submitted that such action would be entirely consistent with the Canadian public interest as it would allow the WBI Canadian line to be built and commercial operation of the project to proceed expeditiously.

### 3.2 Submission of Ocelot Energy Inc.

Ocelot supported the TransGas application for review. In its submission, Ocelot, a producer of natural gas, stated that it had entered into a five-year agreement with Interenergy Corporation ("Interenergy") for the supply of Ocelot's gas at the outlet of the WBI Canadian pipeline. Interenergy would then transport and market the gas on the Williston Basin pipeline system in the United States of America and various downstream connecting pipelines. Ocelot also stated that it had entered into discussions with TransGas and executed a Firm Service Agreement for transportation service with TransGas on the basis of TransGas's standard "postage stamp" tariff for export transportation on its system. Ocelot contends that the Firm Service Agreement was utilized by TransGas in support of the construction of the Steelman/North Portal Extension. Ocelot feared that if the Steelman/North Portal Extension were to come under federal jurisdiction, a separate toll would be charged for transportation on the Steelman/North Portal Extension which would render the total transportation costs prohibitive and Ocelot's gas uncompetitive. Ocelot indicated that it remained supportive of the WBI Canadian application and expressed concern about the consequences of further delay in approving the application.

### 3.3 Submission of Interenergy Corporation

Interenergy confirmed that it had entered into a five-year arrangement with Ocelot to commence 1 November 1992 and indicated that because the pipeline interconnect had not been completed, it was obligated to obtain alternate U.S. supply during the period November 1992 through October 1993. Interenergy submitted that the timing of the Board's decision on the review application is critical in that should there be further delays in the construction of the pipeline interconnect, alternate U.S. supply will have to be sought and ultimately the commerce between Interenergy and Ocelot will be frustrated as its markets will no longer be available to Canadian gas supply.

### 3.4 Submission of TransGas Limited

TransGas submitted that the written evidence adduced during the review proceeding<sup>2</sup> establishes facts previously unavailable to the Board which demonstrate that the Steelman/North Portal Extension is properly subject to provincial jurisdiction. According to TransGas, these facts establish *inter alia* that the new TransGas line is a small but integral part of the TransGas system and that the line fulfils a number of intraprovincial requirements including:

- existing intraprovincial requirements for gas in the Estevan area;
- security of supply and backstopping for existing gas customers and system operating flexibility in southeast Saskatchewan;
- creation of infrastructure to attract industry and develop new intraprovincial gas markets;
- access to and development of gas storage caverns;
- service to and potential expansion of existing electricity generating plants;
- potential receipt points for gas production developing along the route of the line; and
- potential tie-ins to other communities in the area.

TransGas clarified that the new line has been in operation since 4 February 1993 and currently serves many of its intended intraprovincial purposes. TransGas states that there is no corporate relationship between it and WBI Canadian and that shippers must contract independently for the transportation of gas on the TransGas and WBI Canadian lines. TransGas further stated that its line was planned and constructed before the WBI Canadian line. The evidence brought forward by TransGas in respect of the potential intraprovincial purposes of the Steelman/North Portal Extension is more completely summarized in Chapter 2 of this decision.

While TransGas stated that Ocelot has indicated a commitment to contract for 281 10<sup>3</sup>m<sup>3</sup> (10 MMcf) per day of capacity on the new TransGas line, it noted that the contract has not in fact been executed by TransGas and that the capacity sought by Ocelot is only one-quarter of the actual maximum capacity of the line which could be achieved by the construction of additional upstream facilities.

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<sup>2</sup>Written Evidence of Matthew Joseph Masternak on behalf of TransGas dated attached as Exhibit A to the TransGas Submission dated 9 July 1993 and the TransGas responses to the information requests of the Board and Ocelot Energy Inc.

TransGas submitted *inter alia* that a finding of provincial jurisdiction over the new TransGas line is required because the new line is wholly situated within the Province of Saskatchewan and because simple physical connection between federal and provincial facilities is not sufficient to find federal jurisdiction. In addition, TransGas submitted that the new TransGas line is part of a larger and distinct enterprise engaged in the transmission of gas within the Province of Saskatchewan primarily for the purpose of serving intraprovincial requirements, and the new TransGas line is not functionally or operationally integrated with the WBI Canadian line to the necessary extent or degree.

In its submission, TransGas requested that the Board:

1. determine that the evidence before it in this review proceeding, which includes facts that were not placed in evidence in the original proceeding, indicates that the Steelman/North Portal Extension does not constitute part of a federal work or undertaking, does not fall within federal jurisdiction under paragraph 92(10)(a) of the *Constitution Act, 1867* and should not be regulated by the National Energy Board; and
2. vary its decision of 25 February 1993 to approve the WBI Canadian application pursuant to section 58 of the Act.

The Board will deal initially with TransGas's second request before embarking upon the merits of TransGas's first request concerning the jurisdictional question.



## Views and Decisions of the Board

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### 4.1 The WBI Canadian Application

The Board accepts the submission of WBI Canadian that its application for authorization to construct and operate the proposed WBI Canadian line should be considered a separate and distinct matter from the question of the Board's jurisdiction over the new TransGas line. Unlike the situation which existed at the time of the Board's earlier decision, TransGas, the owner of the Steelman/North Portal Extension, is presently before the Board. As well, none of the submitters has commented adversely on the merits of the WBI Canadian application. In the unique circumstances of this review, therefore, the Board agrees with WBI Canadian that whether or not the Board chooses to reaffirm its jurisdiction over the new TransGas line, the proposed WBI Canadian line will fall under the Board's jurisdiction and that, if all of the requirements for approval have been met, it would be possible for the Board to approve the WBI Canadian application. The Board has also considered the requests of Ocelot and Interenergy for a timely decision and WBI Canadian's arguments that it would not be in the public interest to delay the project further. Accordingly, having found that WBI Canadian's applied-for facilities are in the public interest, the Board has varied its decision dated 25 February 1993 and has issued Order XG-W57-3-93, the effect of which is to allow WBI Canadian to proceed with the project described in its application. Attached as Appendix I to this decision is a copy of this Order, which sets out the terms and conditions upon which WBI Canadian is authorized to construct and operate the line.

### 4.2 The Board's Jurisdiction over the Steelman/North Portal Extension

The federal power to regulate pipelines is found in the exceptions to the provincial powers enumerated in paragraph 92(10)(a) of the *Constitution Act, 1867* which provides that the Legislature in a province may exclusively make laws in relation to:

"Local Works and Undertakings other than such as are of the following classes:

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;"

As noted by TransGas, the simple issue to be determined is whether the Board has jurisdiction, pursuant to the provisions of the *National Energy Board Act*, over the 35.6 kilometre section of natural gas pipeline which has been constructed by TransGas from Steelman to North Portal, Saskatchewan. Specifically, the Board must consider the new evidence adduced during the GH-R-1-93 proceeding to determine whether it should confirm, vary or overturn its previous decision dated 25 February 1993.

The Board agrees with TransGas that there are essentially two ways in which the new TransGas line could fall within federal jurisdiction: first, if the new TransGas line is seen as a federal work or undertaking; and second, if it is properly viewed as integral to an existing federal work or undertaking. In *Central Western Railway Corporation v. United Transportation Union et al.*<sup>3</sup>, Dickson, C.J.C. discussed the two approaches:

"For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is *itself* an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking."

The Board is cognizant of the fact that the Supreme Court of Canada has indicated that the particular facts in each situation should be a guide and that the tests established by the Court to date do not constitute a single comprehensive test which will be useful in all cases involving paragraph 92(10)(a). Nevertheless, the Board believes that the "physical connection" and the "vital, integral or essential" tests are useful in this instance to determine the constitutional nature of the new TransGas line.<sup>4</sup>

Jurisdiction over the entire TransGas system was not raised in the Notice of Constitutional Question dated 4 June 1993 related to the GH-R-1-93 proceeding. The question before the Board, rather, is whether the new TransGas line together with the proposed facilities of WBI Canadian, once connected and operational, constitute or comprise one federal work or undertaking which should properly fall within federal jurisdiction under paragraph 92(10)(a) of the *Constitution Act, 1867*.

TransGas submits that to view the Extension in isolation from the remainder of its system would constitute an arbitrary division of the overall TransGas undertaking and that the Board cannot determine the issue of jurisdiction relating to the Extension without considering the entire TransGas system. The Board disagrees. Certainly if it appears that such a pipeline is designed and constructed with an apparent overwhelming primary purpose of transporting natural gas to the export market, it is quite appropriate, if not compelling, to view that portion of the overall (larger) pipeline system in isolation to determine whether that line, once built and operational, will, together with the proposed federal work, form one federal work or undertaking connecting or extending beyond the limits of a province. Furthermore, although it has been observed in *Re the Queen and Cottrell Forwarding Co. Ltd.*<sup>5</sup> that the Courts have consistently resisted attempts to divide business enterprises into distinct undertakings, in the Board's view it does not necessarily follow from the fact that the TransGas System may be predominately local in nature that all sections or segments of its operation must *ipso facto* be local in nature.

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<sup>3</sup>[1990] 3 S.C.R. 112 at 1140.

<sup>4</sup>The Board's interpretation and understanding of the appropriate constitutional tests has been discussed at some length in Chapter 4 of its February 1993 Reasons for Decision in the GHW-1-92 proceeding which addressed a preliminary question of jurisdiction raised in respect of an application filed by Altamont Gas Transmission Canada Limited in July 1991, and which has been referred to in the TransGas submission.

<sup>5</sup>(1981), 124 D.L.R. (3d) 674 at 677-78 (Ont. Div. Ct.).



With respect to TransGas's assertion that *Central Western Railway* stands for the proposition that it is simply the "regulation" of the subject matter and not the putative provincial work or undertaking itself that must be integral to the core federal work or undertaking, the Board notes that such an emphasis was not developed in that decision nor has this interpretation been advanced in subsequent jurisprudence. The logical extension of the TransGas submission is the untenable proposition that other facilities ancillary to a transmission line would not be subject to federal regulation if they could also be adequately regulated by the provinces. In any event, as will be discussed below, the Board is of the opinion that regulation of the new TransGas line is integral to the WBI Canadian line in that the latter consists solely of line pipe.

As mandated by the Courts, the Board has given careful consideration to the evidence concerning the constitutional facts adduced during this proceeding. TransGas has suggested that the primary purpose of the pipeline is to fulfil intraprovincial requirements, including backstopping plus potential for future industry and the Shand plant expansion. While recognizing that the new TransGas line could, to some extent, fulfil some of the enumerated requirements, the Board does not accept that they are sufficient to support a primary intraprovincial purpose. For instance, the Board finds that the prospect of expansion of the Shand plant in the near future is speculative and notes that TransGas has admitted that the Saskatchewan Power Corporation has not finalized the timing and specifics for the addition of generating capacity in the Estevan area. As well, the proposed development of a storage cavern in the area is nebulous and the likelihood of or need for tie-ins to other communities and the connection of a natural gas plant to the Steelman/North Portal Extension are by no means certain.

In the Board's view, the current and reasonably foreseeable intraprovincial uses are merely incidental or collateral to the primary or underlying purpose of the pipeline which is to transport natural gas for export in conjunction with the WBI Canadian line. The uncontroverted fact is that, for the foreseeable future, approximately 90% of the natural gas carried by the Steelman/North Portal Extension will be for export via WBI Canadian. The Board does not give significant weight to the fact that the Ocelot/TransGas contract for 281 10<sup>3</sup>m<sup>3</sup> (10 MMcf) per day of capacity on the new TransGas line has not yet been signed. Nor does the Board consider significant the fact that the Ocelot transportation would, if additional upstream facilities were constructed, account for only one-quarter of the total capacity of an expanded line. Moreover, the Board considers that the quadrupling of the capacity on the Steelman/North Portal Extension is speculative and, furthermore, TransGas admits that any greater capacity could be used to serve export markets as well as local markets in Saskatchewan.

The assertion by TransGas that the new TransGas line "can best be characterized as carrying out a local transportation function at the end of which a transfer to the international transporter takes place" ignores the fact that the major function of the line is to transport gas destined for export - an international purpose. Therefore, in view of this predominant purpose, the line cannot be viewed as a connection at the end of the local transportation process, although this could very well be the case at the point where the new TransGas line connects upstream with the TransGas system. It also ignores the fact that in large part work will occur simultaneously between the proposed WBI Canadian and the new TransGas lines.



The Board is not persuaded that the new TransGas line is simply a small and integral part of the overall TransGas system. In any event, the Board notes that the correct test, as applied by the Supreme Court of Canada in *Central Western Railway* and other cases, is not whether the facilities in question are integral to an intraprovincial work but whether such facilities are vital, integral or essential to the federal work; which is, in this case, the proposed WBI Canadian line.

Despite the submitted intraprovincial purposes and the assertion that the new TransGas line is an integral part of the TransGas system, the inescapable conclusion is that the WBI Canadian line is clearly not independent of the putative provincial work or undertaking. TransGas has acknowledged the obvious fact that if the new TransGas line failed to deliver gas to the point of interconnection between it and the proposed WBI Canadian line, the latter could not operate.

The Board recognizes that mere physical connection is insufficient to trigger federal jurisdiction. However, the Board notes that, once constructed and operations commence, the WBI Canadian line cannot be physically operated without the new TransGas line which will also provide WBI Canadian's entire gas supply. The Board notes that facilities to measure the flow of gas will not be installed on the WBI Canadian line and that the meter facilities which have been constructed on the new TransGas line have not been utilized to date despite operation of that line since 4 February 1993. In fact, TransGas has stated that it is unnecessary to operate the meter station at this time simply to serve as an intermediate metering point and has acknowledged that the primary purpose of its meter station is related to international transportation.

The Board recognizes that the new TransGas line is located entirely within the Province of Saskatchewan; however, the Board notes that the Supreme Court of Canada in *Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*<sup>6</sup> has clearly stated that the location of the physical apparatus in one province and even the fact that all the recipients of a service are within a single province will not preclude a finding that an undertaking is interprovincial or international in scope.

It is also recognized that there is no corporate relationship between TransGas and WBI Canadian. However, the fact that shippers must contract independently for the transportation of gas on their respective lines is in the Board's view dictated by the separate ownership of these lines. As well, although prior to the Board's decision of 25 February 1993 it was intended that construction of the new TransGas line would be co-ordinated with the WBI Canadian line, the fact that this did not occur is not determinative and it remains that, without the new TransGas line, the WBI Canadian line would not be constructed.

Finally, the Board has considerable difficulty with the submission of TransGas that if a "stand-alone" toll for the combined new TransGas and WBI Canadian pipeline would result in the gas being uncompetitively priced in the international market, that fact presents a "logical conclusion that the primary purpose of the Steelman/North Portal Extension cannot be international but must be intraprovincial". The logical extension of this argument is that, in provinces where a "postage-stamp" toll is utilized, there likely can be no federal pipelines,

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<sup>6</sup>[1979] 2 S.C.R. 25; [1989] 5 W.W.R. 385 at 410.

other than short links extending to an international border. Underlying this argument, therefore, is an assumption that by choosing a particular toll structure within a province, that province could influence the determination of the constitutional issue.

In conclusion, the Board does not agree with TransGas's characterization of the new TransGas line as an integrated intraprovincial work and its assertion that the line was created and continues to operate as an intraprovincial transportation system with the primary purpose of supporting the distribution of gas in Saskatchewan. Rather, the Board finds that the Steelman/North Portal Extension, once connected to the proposed WBI Canadian line, will be engaged in continuous and regular extraprovincial transportation of gas for export. The evidence concerning the present and reasonably foreseeable intended intraprovincial purposes and the extent to which the Extension is already fulfilling a number of intraprovincial purposes is, in the Board's view, insufficient to characterize the line as intraprovincial in nature as TransGas has suggested.

### **Decision**

The Board agrees that the review process has provided an opportunity to elicit facts upon which the Board may confirm, vary or overturn its decision dated 25 February 1993 that it has jurisdiction over the new TransGas line.

The Board continues to be of the view expressed in its decision dated 25 February 1993 that the primary purpose of both the new TransGas and the proposed WBI Canadian facilities is to deliver gas produced in Canada to the United States of America, that the TransGas line is integral and essential to the proposed WBI Canadian line, and that when these two lines are joined and operations commence, the combined line will comprise one overall work and undertaking of an international character.

Therefore, having considered the additional evidence concerning the "constitutional facts" put forward by TransGas, the Board is in a position to confirm its previous decision that the new TransGas line, once connected to the WBI Canadian line, is subject to federal jurisdiction and regulation by the Board. Having made this finding, the Board would expect that TransGas will ensure the appropriate authorizations are sought under the Act to operate the Steelman/North Portal Extension prior to commencing deliveries of natural gas to WBI Canadian.

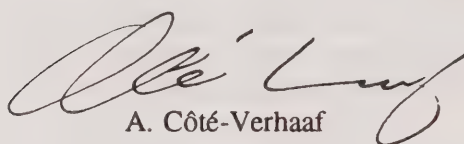
## Disposition

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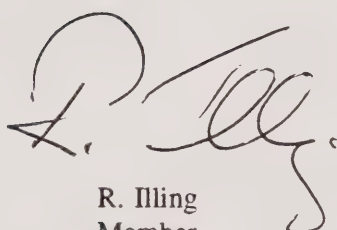
The foregoing chapters constitute our Decision and Reasons for Decision on the WBI Canadian application and on the Board's jurisdiction over the Steelman/North Portal Extension.



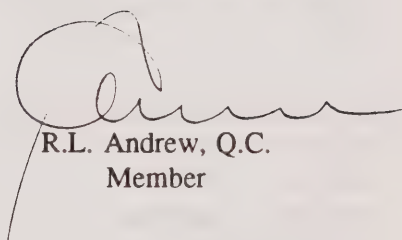
R. Priddle  
Chairman



A. Côté-Verhaaf  
Member



R. Illing  
Member



R.L. Andrew, Q.C.  
Member

Calgary, Alberta  
October 1993

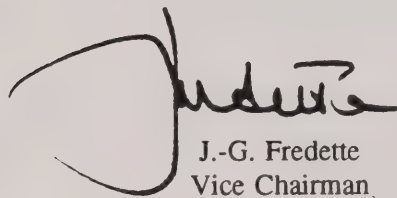


## Dissent

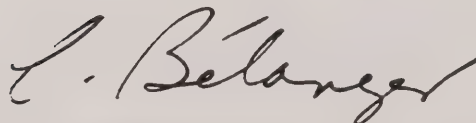
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### **6.1 Dissenting Opinions of J.-G. Fredette and C. Bélanger on the Board's Jurisdiction over the Steelman/North Portal Extension**

We concur with the majority decision to approve the WBI Canadian application, however, we disagree with the decision of the majority concerning the Board's jurisdiction over the Steelman/North Portal Extension and our written dissents will follow.



J.-G. Fredette  
Vice Chairman



C. Bélanger  
Member

IN THE MATTER OF the *National Energy Board Act* ("the Act") and the regulations made thereunder; and

IN THE MATTER OF an application pursuant to section 58 of the Act by WBI Canadian Pipeline, Ltd. ("WBI Canadian"); filed with the National Energy Board ("the Board") under File 3400-W57-1.

**B E F O R E** the Board on 29 September 1993.

WHEREAS the Board received an application from WBI Canadian dated 9 October 1992 pursuant to section 58 of the Act for an Order granting exemption from the provisions of sections 30, 31, 32, and 33 of the Act in respect of certain natural gas transmission pipeline facilities proposed to be constructed at the Canada / U.S.A border near North Portal, Saskatchewan;

AND WHEREAS the Board, in its decision dated 25 February 1993, dismissed WBI Canadian's application for the reasons set out therein;

AND WHEREAS the Board received an application dated 23 April 1993 from TransGas Limited ("TransGas") for a review and variance of the Board's 25 February 1993 decision to dismiss WBI Canadian's section 58 application; filed with the Board under file 3400-W57-1-1;

AND WHEREAS the Board, pursuant to Order GH-R-1-93, conducted a review of its 25 February 1993 decision;

AND WHEREAS the Board has considered the submissions made during the GH-R-1-93 proceeding by TransGas, WBI Canadian, Ocelot Energy Inc., and Interenergy Corporation;

AND WHEREAS the Board has decided to reconsider its 25 February 1993 decision to dismiss the WBI Canadian application;

AND WHEREAS pursuant to the *Environmental Assessment And Review Process Guidelines Order* ("EARP Guidelines Order"), the Board has performed an environmental screening and has considered the information submitted by WBI Canadian;

AND WHEREAS the Board has determined, pursuant to paragraph 12(c) of the EARP Guidelines Order, that the potentially adverse environmental effects, including the social effects directly related to those environmental effects, which may be caused by the proposed pipeline are insignificant or mitigable with known technology and as the Board is not aware of any public concern about the proposal there is no need to refer it for a panel review;

AND WHEREAS the Board has examined the application and considers it to be in the public interest to grant the relief requested therein;

IT IS ORDERED THAT the proposed WBI Canadian pipeline, consisting of approximately 1.15 km of 219.1 mm outside diameter pipe extending from a point immediately outside the property line of the TransGas North Portal Meter Station located at the Northeast Quarter of Section Three, Township 1, Range 5, West of the Second Meridian in the Province of Saskatchewan, to a point of interconnection with the pipeline of Williston Basin Interstate Pipeline Company at a point on the Canada / U.S.A. border at the Southeast Quarter of Section Three, Township 1, Range 5, West of the Second Meridian, is exempt from the provisions of paragraph 30(1)(a) and section 31 of the Act, subject to the following conditions:

1. WBI Canadian shall file for the Board's approval, prior to the commencement of operations, an outline of the measures that will be taken to prevent an over-pressure of its pipeline in the event of flow reversal.
2. Unless the Board otherwise directs prior to 31 December 1994, this Order shall expire on 31 December 1994 if the construction of the proposed WBI Canadian pipeline has not commenced by that date.

NATIONAL ENERGY BOARD

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J.S. Richardson  
Secretary







